No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SCOTT KERNAN,
Petitoner,

-v-

MICHAEL DANIEL CUERO,
Respondent.

BRIEF IN OPPOSITION FOR THE RESPONDENT

DEVIN J. BURSTEIN
Warren & Burstein
501 West Broadway, Suite 240
San Diego, CA 92101
(619) 234-4433

Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals properly granted federal habeas relief under the particular facts of this case because the state-court prosecutor breached the plea agreement in violation of this Court's clearly established precedent.

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IN THE SUPREME COURT OF THE UNITED STATES

SCOTT KERNAN,

Petitioner,

- v -

MICHAEL DANIEL CUERO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-97a) is reported at 827 F.3d 879.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2016. Pet. App. 1a. A petition for rehearing en banc was denied on March 8, 2017. Pet. App. 98a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case began with a car accident. According to the California appellate court's unpublished opinion,

> On October 14, 2005, Cuero was driving on Potrero Valley Road when he hit a trailer attached to a pickup truck parked on the side of the road. Cuero also hit the driver of the pickup truck who was outside the truck. The pickup truck driver sustained severe injuries[.] Cuero appeared to be under the influence when a highway patrol officer arrived at the scene. When Cuero's blood was tested for alcohol or drugs, his blood was positive for methamphetamine. A loaded firearm was found nearby.

ER:199.[1]

a. The state charged Mr. Cuero with: (1) causing bodily injury to a person while driving under the influence, enhanced by a prior driving-under-the-influence conviction within ten years (a felony); (2) possession of a firearm by a felon (a felony); and (3) being under the influence of a controlled substance (a misdemeanor). ER:4-5.

[1] "ER" refers to the Excerpt of Record on file with the court of appeals. *See* Supreme Court Rule 7 ("In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court.").

The state then filed an amended complaint, including a special allegation that Mr. Cuero inflicted great bodily injury during the commission of the charged crime. ER:9. The amended complaint also alleged: (1) a single, prior "strike" conviction for first-degree burglary and (2) four prior prison terms. ER:11-12. As relevant, one of these alleged prior convictions – prosecuted in the same courthouse by the same prosecutor's office, ER:71 – was assault with a deadly weapon, in violation of Cal. Penal Code § 245(a)(1). ER:11.

After filing the amended complaint, the state entered into a written plea agreement with Mr. Cuero. ER:14-16. Mr. Cuero agreed to plead guilty to counts one and two of the amended complaint (the two felonies). ER:14. He also agreed to admit the single strike allegation, and the four prison priors. ER:14. In exchange, and to induce the plea, the state guaranteed a maximum prison sentence of 14 years and 4 months, and agreed to dismiss the misdemeanor charge. ER:15. As to the exact sentence, the agreement explained there were no deals with the state. ER:14. In other words, the prosecutor was free to recommend a sentence up to 14 years and 4 months, while Mr. Cuero could recommend a shorter term. ER:14-15.

Along with Mr. Cuero, the prosecutor signed the plea agreement indicating the state's concurrence with its terms:

PROSECUTOR'S STATEMENT

The People of the State of California, plaintiff, by its attorney, the District Attorney for the County of San Diego, concurs with the defendant's plea of Guilty/No Contest as set forth above.

Dated: 12-2-04 (Print Name) Deputy District Attorney (Signature)

ER:16.

During the change of plea hearing, the parties explained the terms of the agreement to the court. ER:118. The court confirmed that, as a result of the agreement, "[h]is maximum exposure is 14 years, 4 months in state prison . . . . *That's the most he could receive by way of this plea*[.]" ER:119 (emphasis added). The prosecutor agreed. ER:119.

On the basis of that representation, Mr. Cuero waived his trial rights and pleaded guilty. ER:122-23. He also admitted the single strike and each of the alleged prison priors (as required by the plea agreement). ER:124-25. The court then expressly accepted the guilty plea, and, as agreed, the state dismissed the misdemeanor charge. ER:125 (court accepts "the defendant's plea and admissions"); ER:16 (court concludes, "the defendant is convicted thereby."). The court then set a sentencing date. ER:125-26. At no point during the change of plea hearing did the court or the prosecutor advise Mr. Cuero that his plea was anything other than final.

The Probation Department subsequently filed a presentence report. It confirmed Mr. Cuero's prior conviction for assault with a deadly weapon in violation of Cal. Penal Code § 245(a)(1) – which had been alleged in the amended complaint and admitted as a prison prior, but not as a strike. The report further determined the maximum possible sentence under the plea agreement was 14 years and 4 months (just as the parties agreed). ER:60.

b. Following the probation report, petitioner unilaterally abrogated the plea agreement the day before the sentencing hearing, by filing a motion to amend the complaint. ER:29. The prosecutor asserted that, in preparing for the sentencing, she "came upon documentation that proved that the PC245(a)(1) conviction [the prison prior] . . . had an allegation of Penal Code section 1192.7(c)(23) [personal use of weapon] allegation which was pled and proved." ER:30. This meant the conviction qualified as a second strike. Petitioner asked the superior court to allow it to amend the complaint to include this prior as a strike, thus alleging Mr. Cuero was a "third-striker" under California law and drastically increasing his sentence to a mandatory life term. ER:30.

Mr. Cuero's counsel filed an opposition, urging the court to deny the motion to amend. ER:64. Counsel explained, "[t]he delay in filing or amending the complaint[] in this case lies solely with the prosecution. The failure of filing the

amendment prior to the entry of the plea in this case rests solely on the Plaintiff's lack of diligence. The prejudice here is to Defendant, not the state. Defendant is prejudiced by the failure of the Plaintiff to allow him to stand on the plea agreement into which he entered." ER:69.

Counsel further noted there was no reason the state could not have found the information about the second strike prior to the guilty plea. ER:69. To this end, "the complaint here specifically alleged, at page 3, a prison prior for a 'PC 245(A)(1).'" ER:70. The state always "had knowledge of the conviction." ER:70. And "[t]he presence of such a conviction alleged on a complaint should have triggered immediate research. Yet the prosecution apparently conducted no effort to research." ER:70. This lack of prosecutorial diligence was unjustifiable because "the prior [section 245(a)(1)] conviction in this case was not out of state . . . . It was a prior conviction on a case right here in the El Cajon Courthouse of San Diego County . . . . It cannot be presumed that the Plaintiff in this case did not have access to its own files or databases or files or databases of this courthouse." ER:71.

Over Mr. Cuero's objection, the superior court granted the state's motion to amend. ER:142. The newly amended complaint – the second amended complaint – charged the original three counts, including the previously dismissed

misdemeanor. ER:74. It also contained an allegation that Mr. Cuero had two prior strikes – the previously alleged burglary under Cal. Penal Code §§ 459, 460, and the newly added assault under Cal. Penal Code § 245(a)(1) –increasing his potential sentence from the promised 14 years and 4 months, to sixty-four years to life. ER:78, 161.

Based on the multiple strike enhancements in the amended complaint, Mr. Cuero was left with no way around an indeterminate life sentence. The only question was where his parole eligibility would start. Given his new reality, and to avoid a minimum of sixty-four years before eligibility, he entered into a second agreement with the state, under which he would receive a mandatory sentence of twenty-five years to life. ER:84-85; 159-63. In accordance with this new agreement, the superior court sentenced Mr. Cuero to twenty-five years to life in prison. ER:96-97; 184.

c. The California court of appeal affirmed Mr. Cuero's conviction and sentence. ER:198-200. The court noted a "possible" issue as to "whether the amendment violated the terms of the earlier plea agreement in violation of due process." ER:200. But it concluded this was not a "reasonably arguable appellate issue." ER:200.

The state courts then denied Mr. Cuero's pro se petitions for a writ of habeas corpus. ER:237, 311, 315-16, 341. In these petitions, he argued, among other claims, the state breached the plea agreement. ER:260. He cited this Court's decision is *Santobello v. New York*, 404 U.S. 257, 262 (1971), ER:267, 300-02, and noted his right to "specific performance of the agreement." ER:260.

2. a. Mr. Cuero then filed a timely pro se petition for a writ of habeas corpus in the United States District Court for the Southern District of California. ER:348. Again citing *Santobello*, ER:351, he argued the state violated his constitutional rights by "fail[ing] to keep a commitment concerning sentence recommendation on a guilty plea." ER:360. Mr. Cuero further asserted, "the state prosecutor had broken a promise made in return for the agreement to plead guilty," a "violation of due process[.]" ER:360. The district court denied the petition. ER:466.

b. Mr. Cuero filed a pro se notice of appeal with the federal court of appeals, which appointed counsel. ER:468-69. This was the first time Mr. Cuero was represented by counsel in collateral proceedings.

On appeal, Mr. Cuero argued the state breached the plea agreement in violation of his due-process rights by amending the complaint and failing to honor the agreed-upon 14 year and 4 months maximum sentence. The prejudice,

moreover, was undeniable. But for the due-process violation, he would have received a shorter sentence. As a result, under *Santobello* and its progeny, the state courts should have disallowed the amendment to the complaint, and ordered specific performance of the plea agreement. Their failure to do so was an unreasonable application of this Court's clearly established precedent.

The court of appeals agreed. The panel majority concluded "the Superior Court judge unreasonably applied clearly established Supreme Court authority by failing to recognize that the 'breach [was] undoubtedly a violation of the defendant's rights.' *Puckett v. United States*, 556 U.S. 129, 136 (2009) (citing *Santobello*, 404 U.S. at 262). That the Superior Court allowed Cuero to withdraw his guilty plea and enter a new plea agreement calling for an indeterminate 25 years to life sentence was no remedy here; Cuero lost the benefit of his original bargain." Pet. App. 6a.

In support of this ruling, after a lengthy discussion of the proper standard under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), the court explained, "[u]nder clearly established Supreme Court law, Cuero stood convicted and his plea agreement became binding the moment the first Superior Court judge accepted his guilty plea. 'A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction.' *Boykin* [*v. Alabama*], 395

U.S. [238,] 242 ([1969])." Pet. App. 9a. To this end, "[a] defendant's guilty plea [] 'implicates the Constitution,' transforming the plea bargain from a 'mere executory agreement' into a binding contract. *Mabry* [*v. Johnson*], 467 U.S. [504,] 507-08 [1984])." Pet. App. 9a.

The court further confirmed that, under Supreme Court precedent, "'[w]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, *such promise must be fulfilled.*' *Santobello*, 404 U.S. at 262 (emphasis added); *see also* Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 60 Calif. L. Rev. 471, 474 (1978) (citing the language quoted above as the 'undisputed holding' of Santobello)." Pet. App. 9a.

Turning to the question of whether the state breached the plea agreement, the court explained, "'the construction of [a] plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law.'" Pet. App. 16a (quoting *Ricketts v. Adamson*, 483 U.S. 1, 5 n.3, (1987)). And "[u]nder California law, '[a] plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound.' *People v. Segura*, [44 Cal. 4th 921] (Cal. 2008) (quoting *People v. Ames*, [213 Cal. App. 3d 1214] (Ct. App. 1989))." Pet. App. 17a.

Accordingly, "'[a] negotiated plea agreement . . . is interpreted according to general contract principles. . . . Moreover, '[a]lthough a plea agreement does not divest the court of its inherent sentencing discretion, a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain.' *Segura*, [] (quoting *Ames*, 261 Cal. Rptr. at 913)." Pet. App. 17a.

The court of appeals determined that, "[b]y seeking to amend the charges in the complaint, the prosecution denied Cuero the benefit of his bargain: a maximum sentence of 14 years and 4 months. And, as a result of the amendment, the Superior Court ultimately imposed an indeterminate life sentence well beyond the limits of the plea agreement." Pet. App. 18a. In doing so, the superior court "fail[ed] to interpret Cuero's plea agreement consistently with California contract law," and thus "unreasonably applied federal law clearly established by the Supreme Court in *Adamson* nearly thirty years ago." Pet. App. 20a-21a.

As to remedy, the court of appeals held, "[t]he Superior Court also unreasonably applied clearly established federal law by failing to order specific performance of Cuero's plea agreement. A state court must supply a remedy for a breached plea agreement that comports with state contract law. *See Puckett*, 556 U.S. at 137; *Adamson*, 483 U.S. at 5 n.3[]. Under California law, the remedy for breach must 'repair the harm caused by the breach.' *People v. Toscano*, [124 Cal.

App. 4th 340, 345] (Ct. App. 2004). 'When the breach [alleged] is a refusal by the prosecutor to comply with the agreement, specific enforcement would consist of an order directing the prosecutor to fulfill the bargain and will be granted where there is a substantial possibility that specific performance will completely repair the harm caused by the prosecutor's breach.' *In re Timothy N.*, [216 Cal. App. 4th 725, 738] (Ct. App. 2013) (alteration in original) (quoting *People v. Kaanehe*, 19 Cal. 3d 1, 13, (1977))." Pet. App. 21a.

Further, in Mr. Cuero's situation, "that the state court permitted [him] to withdraw his plea did not 'repair the harm' caused by the prosecutor's breach. To the contrary: It exposed Cuero to the risk of going to trial and receiving an indeterminate 64 years to life sentence. This is hardly the 'remedy' Cuero would have elected had he properly been given a choice. That Cuero was ultimately able to 'bargain' for an indeterminate 25 years to life sentence does not alter the analysis; the state could not have lawfully pursued an indeterminate life sentence in the first place if it had not been allowed to breach the plea agreement." Pet. App. 22a-23a.

Finally, the court of appeals concluded, "[t]he San Diego Superior Court failed to recognize that Cuero's entry and [the court's] acceptance of Cuero's guilty plea pursuant to the written plea agreement was binding on both sides. By

allowing the prosecution to breach the agreement, reneging on the promise that induced Cuero's plea, the state court violated federal law clearly established by the Supreme Court in *Santobello*. It further violated clearly established federal law requiring construction of the plea agreement under state contract law. *See Adamson*, 483 U.S. at 5 n.3[.]. . . . This error had a 'substantial and injurious effect' on Cuero, who is serving an indeterminate life sentence, the minimum term of which, 25 years, is well in excess of the 14 year, 4 month maximum promised by the government. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted). Cuero is entitled to habeas relief." Pet. App. 23a-24a.

One judge dissented. His primary argument was that there was no plea agreement between Mr. Cuero and the state. Pet. App. 34a, 43a.[2] He further argued that, even if there was, no clearly established law of this Court required specific performance of that agreement. Pet. App. 58a-59a.[3]

d. The court of appeals denied rehearing en banc. Thereafter, the mandate issued. Petitioner then filed an untimely motion to stay the mandate,

[2] That contention was contrary to state's arguments to the court of appeals and to this Court, where it concedes the parties had entered into a plea agreement. Pet. 13 n.5.

[3] Petitioner summarizes the dissent further at Pet. 13-14.

which was properly denied pursuant to *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). CA Dckt. Nos. 73-74.[4] Petitioner did not move for a stay in this Court.

e. Mr. Cuero was then returned to state court. The state court reinstated the pre-amendment complaint, and Mr. Cuero reentered his guilty plea under the original plea agreement. Respondent's Appendix (Res. App.) a1. The court further exercised its discretion to resentence Mr. Cuero to thirteen years and four months. Res. App. a3-a4. The federal district court then discharged the writ of habeas corpus. DC Dckt. No. 76.

ARGUMENT

The petition for a writ of certiorari should be denied because: (1) the matter is moot – given the reinstatement of the original plea and the resentencing, there is no longer a case or controversy; (2) this case has little import beyond Mr. Cuero's unique situation – the opinion below does not impact California criminal procedure; and (3) the petition does not qualify for review under Rule 10(a) because the decision below involved a straightforward application of this Court's *Santobello* jurisprudence, and does not improperly expand this Court's decisions.

1. The matter is moot. Having slept on its rights, petitioner allowed the court of appeals' mandate to issue, the resentencing to go forward in state court, and the

[4] "CA Dckt. No." refers to the Clerk's Docket in the court of appeals. "DC Dckt. No." refers to the Clerk's Docket in the district court.

federal district court to discharge the writ of habeas corpus. Thus, there is no longer a case or controversy for this Court to review.

Indeed, even if this Court granted further review and reversed the court of appeals, it would be a pyrrhic result. As the state concedes (Pet. 15, n.6), the California superior court, in accordance with state law, resentenced Mr. Cuero. What the state neglects to disclose, however, is that, as part of the resentencing proceeding, Mr. Cuero reentered his guilty plea to the original charges. *See* Res. App. a1-a5. That plea limited his potential custodial exposure to 14 years and 4 months, and he received a sentence of 13 years and 4 months.[5] The state did not appeal.

Thus, there is no means by which the previously imposed twenty-five years-to-life term could be reinstated. As a result, even if this Court vacates the court of appeals' decision granting the habeas petition, it would have no impact. The state court resentencing is final, and vacatur of the writ would not change that reality. *See St. Pierre v. United States*, 319 U.S. 41, 42 43 (1943) (the matter was deemed moot because "[t]he sentence cannot be enlarged by this

[5] In other words, the state court did not merely resentence Mr. Cuero under his then-existing guilty plea and convictions, as he anticipated. *See* CA Dckt. No. 75 at 4 5. Instead, it chose to have him re-plead guilty to the charges (and priors) forming the basis of the first plea agreement, and then sentenced him accordingly.

Court's judgment, and reversal of the judgment below cannot operate to undo what has been done[.]").

Moreover, petitioner – through its inaction – is entirely responsible for this jurisdictional impediment. It failed to seek a stay of the mandate in the court of appeals at an appropriate time, that is, when the court was empowered to act. CA Dckt. Nos. 73-74. Only after the mandate issued, did it move for a stay, which was properly denied as untimely. *See Calderon*, 523 U.S. at 550 (noting a profound interest in repose attaching to the mandate of a court of appeals, and explaining the power to stay a mandate "can be exercised only in extraordinary circumstances" as a "last resort, to be held in reserve against grave, unforeseen contingencies.").

Thereafter, it failed to seek a stay from this Court. *See* S. Ct. R. 23; *St. Pierre*, 319 U.S. at 43 (that petitioner "did not apply to this Court for a stay" supported mootness finding). Nor did petitioner object when the federal district court discharged the writ. DC Dckt. No. 76. Finally, it has not sought review in this Court of the state court resentencing, only of the court of appeals' decision. Pet. 1.

Accordingly, because a favorable judicial decision for petitioner would have no effect on Mr. Cuero's now-final sentence, the case is moot. And as this Court

explained in *Spencer v. Kemna*, 523 U.S. 1, 18 (1998), "mootness, however it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so. We are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong."

2. The decision below turned on the peculiar facts of this case and has no impact on California criminal procedure or any California statutes. The thrust of petitioner's argument for further review is that the decision below undermines, or somehow invalidates, California Penal Code § 969.5(a), which allows the state to amend a charging document post-plea under certain circumstances (Pet. 4-5, 15-16, 26-27). But this contention is a red herring, designed to make it appear this case has import beyond its unique facts. It does not.

Following the court of appeals' decision, just as before, the state may invoke section 969.5(a) to amend a charging document. The only limitation is if, as here, the state has promised not to do so, either implicitly or explicitly, as part of a plea agreement that induces the defendant's plea. In that scenario, *Santobello* requires the prosecutorial "promise . . . [to] be fulfilled." 404 U.S. at 262. The majority below made this point directly: "'[A] prosecutor may withdraw from a plea bargain at any time *before the defendant pleads guilty* or otherwise detrimentally relies on

that bargain.' Once a defendant enters a guilty plea pursuant to a plea agreement, the state is bound by the agreement and any attempt by the state to withdraw--through a motion to amend the complaint pursuant to § 969.5 or otherwise--constitutes a breach." Pet. App. 19a, n.12. (emphasis in original) (citations omitted).[6]

As this statement illustrates, the court of appeals did not rule on, or even consider, what section 969.5 permits in the absence of a binding, executed plea agreement detrimentally relied upon, and accepted by the court. Indeed, petitioner's contrary assertion that the court of appeals "upende[d]" settled California criminal procedure and "displace[d] the considered judgment of the state Legislature," is belied by the fact that *not a single California state court has cited the decision below* for any purpose, much less to find that it overturned part of the penal code. Pet. 26. Nor, during litigation, could the parties or the court of appeals locate any case addressing section 969.5 in the binding plea agreement context. *See* Pet. App. at 64a, n.21 (dissenting judge notes only one factually similar case, and the issue was not addressed).

[6] As discussed further below, this is a constitutional constraint, flowing directly from this Court's decisions on a criminal defendant's due process right to enforce the terms of his or her plea agreement, once the plea is entered and accepted.

To this point, and also militating against further review, section 969.5 does not even apply under the facts here. On its face, that provision permits post-guilty-plea amendment *only* when the charging document "does not charge all prior felonies of which the defendant has been convicted." Cal. Penal Code § 969.5(a). Here, however, the conviction constituting the newly added second strike *was* charged in the complaint, as a prison prior. ER:11.

Specifically, the complaint to which Mr. Cuero pleaded guilty pursuant to his initial plea agreement alleged that he served four prior prison terms, one of them being assault with a deadly weapon, in violation of Cal. Penal Code § 245(a)(1). ER:11. The state's post-plea amended complaint alleged *the same section 245(a)(1) conviction.* ER:78. It merely changed the classification of that conviction from a prison prior, to a strike prior. ER:78. In other words, the

amendment did not address a previously uncharged felony.[7] *See* Pet. App. 19a, n.12 (tracking the language in the state statute, the majority opinion recognized, "the state *did* charge 'all prior felonies of which [Cuero] ha[d] been convicted' in the original complaint it simply did not charge Cuero's felony assault conviction *as a strike*.") (emphasis in original). Accordingly, petitioner's invocation of section 969.5 is invalid under the provision's plain language.

As such, there is no merit to petitioner's purported concern that, without further review by this Court, the court of appeals' decision will "effectively invalidate[] a state criminal procedure that has been part of California law for more

[7] Petitioner's suggestion that it "learned" the conviction was a strike only after the guilty plea is baseless. Pet. 6. An assault conviction under Penal Code § 245(a)(1) is always a strike when accomplished by the defendant's personal use of a weapon or the infliction of great bodily injury. ER:70; *see People v. Fox*, 224 Cal. App. 4th 424, 434 n.8 (Cal. App. 2014) (explaining the circumstances under which section 245(a)(1) is a strike). Thus, whenever a defendant has a conviction under section 245(a)(1), the state is on notice, and must examine the conviction documents to determine whether the conviction is a strike prior. ER:70. Moreover, this particular prior conviction occurred in the same courthouse, and was prosecuted by the same prosecuting agency as his current charges. Only petitioner is to blame for its negligence in failing to examine its own records.

than eighty years." Pet. 26.[8] To the contrary, the only impact of the decision below is on Mr. Cuero. And as discussed in the next section, it merely represents

[8] Petitioner also makes passing reference to Cal. Penal Code § 1192.5 (which it relied on extensively below). The provision now plays a diminished role in petitioner's argument, because it contradicts the premise that the decision below undermines state criminal procedure. To avoid this fact, petitioner hides the ball, providing the Court with only a select portion of the provision (Pet. 3), omitting the most relevant portion, italicized below.

> *Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea.*
>
> If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.

Cal. Penal Code § 1192.5 (emphasis added). During Mr. Cuero's guilty plea, the state court never advised him its approval was not binding. Rather, it said, "[g]uilty plea is received." ER:125. Nor did the court "withdraw its approval in the light of further consideration of the matter." *Id.* Petitioner never made such a request. Thus, the only applicable portion of the statute is the first paragraph's general provision, under which Mr. Cuero could not "be sentenced on the plea to a punishment more severe than that specified in the plea." And this is in accord with the decision below. Pet. App. 18a, n.11 ("Section 1192.5 actually prohibits what took place here.").

a straightforward application of this Court's clearly established precedent.

3. The court of appeals correctly determined the state court unreasonably applied, and acted contrary to, clearly established Federal law, as determined by this Court. Petitioner concedes that, prior to Mr. Cuero's initial guilty plea, it entered into a plea agreement with him. Pet. 13, n.5.[9] In exchange for waiving his constitutional rights and pleading guilty to two felonies, he would receive a sentence of no more than 14 years and 4 months, and the state would also dismiss a

[9] Indeed, throughout its briefing, petitioner made the same concession. *See* petitioner's answering brief before the court of appeals at 10, 17, 36 (characterizing the initial agreement as "the plea agreement"); petition for rehearing before the court of appeals at 1 (recognizing the parties entered into a "plea agreement."). This concession is notable because, among other reasons, it contradicts the central argument of the dissenting judge below.

According to the dissent, there was no plea agreement because the plea forms included the clause, "STC [Sentence to the Court] - No deals with the people." *Cuero*, 827 F.3d at 901. But this "no deals" clause came immediately after "STC," indicating only that the agreement did not include a specific sentencing recommendation from the state. *See id.* at 886, n.7. As the state court judge explained at the time of the plea, "[i]t is a *sentence* for the court, no deals with the People." *Id.* at 886 (emphasis added). Thus, everyone involved understood "no deals" simply meant that the plea agreement did not include a provision regarding the particular sentence to be recommended by the state. Rather, it could argue for up to the maximum 14 years and 4 months.

pending misdemeanor. ER:15; 119.[10] This promise was made in writing, and orally during the change of plea hearing. ER:118-119. At the conclusion of the plea hearing, the state court accepted the plea and found Mr. Cuero guilty. ER:125. It also signed a written order stating "[t]he Court accepts the defendant's pleas and admissions, *and the defendant is convicted thereby.*" ER:16 (emphasis added).

At that movement, under this Court's clearly established precedent, the terms of his plea agreement were set, binding, and enforceable. Indeed, "[a] plea of guilty . . . is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin*, 395 U.S. at 242. To this end, as the Court held in *Mabry*, 467 U.S. at 507-08:

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. ***It is the ensuing guilty plea that implicates the Constitution.*** Only after respondent pleaded guilty was he convicted[.]

[10] Absent the state's agreement not to seek a higher sentence, there was no reason for Mr. Cuero to give up all his rights and plead guilty under the plea agreement. In other words, the inducement was, and only could have been, the state's relinquishment of any right to seek additional enhancements under California law.

(Emphasis added).[11]

California law is in accord. Once a "plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant ... *cannot be sentenced on the plea to a punishment more severe than that specified in the plea* and the court may not proceed as to the plea other than as specified in the plea." California Penal Code § 1192.5 (emphasis added). Accordingly, Mr. Cuero's

[11] The dissenter below argued that a plea agreement is enforceable only upon entry of the final judgment. Pet. App. 47a. Petitioner maintains this argument, claiming Mr. Cuero's agreement was unenforceable because his "initial plea, although accepted by the state trial court, was never embodied in a judgment." Pet. 20. Both the dissent and petitioner misread *Mabry* by taking a single word out of context. In *Mabry*, the issue was whether the defendant's due process concerns are implicated when a defendant accepts the prosecution's offer, or when he pleads guilty in detrimental reliance on the agreement. The Court's key holding was that the guilty plea triggers due process protections; it is "the ensuing guilty plea that implicates the constitution." *Mabry*, 467 U.S. at 507-08; accord *Puckett*, 556 U.S. at 137-38 ("It is precisely *because* the plea was knowing and voluntary (and hence valid) that the Government is obligated to uphold its side of the bargain.") (emphasis in original).

Similarly, in *Santobello*, the Court found the prosecutor's breach occurred at sentencing, when the prosecutor failed to abide its commitment not to make a sentencing recommendation. Thus, because sentencing occurs before final judgment, *Santobello* is directly contrary to the dissent and petitioner's argument.

Further, the argument is nonsensical. Under such a strained interpretation, a defendant could never raise a breach in the trial court, since there is no final judgment filed until after sentencing has taken place. Thus, the breach could be addressed only on appeal, but it would never be properly preserved. In other words, petitioner's position would render the due process rights embodied in *Santobello* illusory.

guilty plea, once accepted, transformed the plea bargain into a binding contract, and vested him with a due process right to enforce the terms. *See Santobello*, 404 U.S. at 263.

Nor can there be any doubt petitioner breached the plea agreement when it successfully moved to amend the complaint, as evidenced by the fact Mr. Cuero did not receive the benefit of his bargain, a sentence of no more than 14 years and 4 months. Petitioner, however, argues the court of appeals improperly failed to defer to state court interpretation of state contract laws. The claim is without merit.

California law is clear: "A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." *People v. Shelton*, 37 Cal. 4th 759, 767 (2006). Under those principles, in exchange for Mr. Cuero's guilty plea, the state guaranteed his maximum punishment would not increase. The court of appeals did not usurp any state decision by arriving at the common-sense conclusion that the post-plea amended charges constituted a breach of that promise.

Finally, on the facts here, specific performance was the only viable remedy. Under this Court's precedent, the remedy for breach must comport with state contract law. *See Puckett*, 556 U.S. at 137; *Adamson*, 483 U.S. at 5, n.3. And

California law requires the remedy to "repair the harm caused by the breach." *Toscano*, 124 Cal. App. 4th at 345.

Given that the state had already received the benefit it sought (the guilty plea and conviction) – specific performance was the only means to repair the harm; to give Mr. Cuero his promised sentence of no more than 14 years, 4 months. *See People v. Timothy N.* (*In re Timothy N.*), 216 Cal. App. 4th 725, 738 (2013) ("When the breach [alleged] is a refusal by the prosecutor to comply with the agreement, specific enforcement would consist of an order directing the prosecutor to fulfill the bargain and will be granted where there is a substantial possibility that specific performance will completely repair the harm caused by the prosecutor's breach."). As this Court held in *Neale v. Neale*, 76 U.S. 1, 13 (1869), when others remedies will not cure "the breach of th[e] contract, nor answer the intention of the parties to it, [] a specific performance is [] essential to the complete ends of justice."

The only other option – rescission – would serve as no remedy at all, because Mr. Cuero then faced 64 years to life. Surely, that is not what he

bargained for.[12] As Judge Wardlaw wrote in her concurrence to the denial of rehearing en banc, "'[p]ermitting' Cuero to withdraw his guilty plea and plead guilty to the constitutionally defective amended complaint, the alternative remedy proposed, did not repair the harm caused by the breach; instead, it allowed the *prosecution* to achieve the precise outcome it sought in breaching the plea agreement."). Pet. App. 112a (emphasis in original). *See also Santobello*, 404 U.S. at 267 ("In choosing a remedy [] a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State.") (Justice Douglas, concurring).

The court of appeals, therefore, was on firm footing in determining only specific performance would faithfully comply with this Court's requirement that "when a plea rests in any significant degree on a promise or agreement of the

[12] Nor was it the state court's chosen remedy, because the state court denied Mr. Cuero's objection to the post-plea amendment of the complaint. In other words, the state court did not exercise discretion, much less sound discretion, in determining whether specific performance or remission would protect Mr. Cuero's right to due process.

prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DEVIN BURSTEIN
Warren & Burstein
501 West Broadway, Suite 240
San Diego, CA 92101
(619) 234-4433

[13] Although *Santobello* ultimately remanded the remedy decision to the state court, it appears to be because Mr. Santobello did not seek specific performance, but rather asked for "the opportunity to withdraw his plea." *Id.* at 263. Of course, Mr. Cuero has always sought the remedy he has already obtained – resentencing to no more than 14 years and 4 months.